

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2))	MB Docket No. 18-23
)	
Modernization of Media Regulation Initiative)	MB Docket No. 17-105
)	
Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules And Policies)	MB Docket No. 98-204 MB Docket No. 16-410

To the Commission

COMMENTS OF THE EEO SUPPORTERS

For twenty years, the EEO Supporters (*see* Annex, providing list of the 33 current participants in this group) have encouraged the FCC to complete its 1998 proceeding (MB Docket 98-204) on EEO enforcement. At last the agency has reawakened the EEO docket from 14 years of somnolence¹ on this critical issue:

the FCC’s track record on EEO enforcement and how the agency can make improvements to EEO compliance and enforcement.²

¹ *See, e.g.,* MMTC and NABOB, *The Facts About Current Issues in Broadcast Regulation*, (November 9, 2017), available at <http://www.mmtconline.org/wp-content/uploads/2017/11/MMTC-NABOB-The-Facts-About-Bcast-Regulation.pdf> (last visited April 15, 2018) (“Since 2004, the FCC has had before it a request by 48 national organizations to upgrade its EEO enforcement by focusing on the primary manner in which it has found discrimination to occur in broadcasting: recruiting primarily by word-of-mouth from a homogeneous workplace. That request has been renewed on several occasions, to no avail. The FCC’s repeated failure to address this issue under three Republican and four Democratic chairs or acting chairs speaks poorly of the agency’s institutional commitment to equal opportunity.”)

² *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2)*, MB Docket No. 18-23, Notice of Proposed Rulemaking, FCC 18-20 (released February 22, 2018) (“NPRM”) at 6 ¶11.

Prosecuting Discriminators While Stopping Prosecutions Of Nondiscriminators

The purpose of the Commission's broadcast Equal Employment Opportunity (EEO) rules is to prevent discrimination.³ To accomplish this, the Commission discourages the nearly-exclusive use of word-of-mouth (WOM) recruiting.⁴ However, the Commission has failed to address the core issue of nearly-exclusive WOM recruitment conducted by a homogeneous, non-diverse staff, which the Commission has long recognized to be inherently discriminatory because it leads to the perpetuation across generations of a non-diverse staff recruited primarily from employees' family and social affinity groups.⁵ This practice, commonly referred to as "cronyism," is the primary reason why key sectors of the broadcast industry remain largely closed to people of color and, often, to all but a handful of women. As former television group broadcaster W. Don Cornwell explains:

"[W]ord-of-mouth recruitment is very significant in the broadcast industry...if a company is not ethnically diverse at the outset, the word-of-mouth process can be detrimental to minorities seeking full time jobs."⁶

Before 2002, to determine whether a broadcast station's staff is homogeneous, the Commission collected and calculated staff composition by using Form 395. Although courts

³ See *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Report and Order and Third Notice of Proposed Rule Making, 17 FCC Rcd 24018 (2002) ("2002 EEO Order").

⁴ See, e.g., *Jacor Broadcasting Corporation*, 12 FCC Rcd 7934 (1997) ("Jacor"); *Walton Broadcasting, Inc.* (KIKX, Tucson, AZ) (Decision), 78 FCC 2d 857, recon. denied, 83 FCC 2d 440 (1980) ("Walton").

⁵ *MMTC Ex Parte Letter re Preserving the Open Internet and Equal Employment Opportunity*, WC Docket No. 17-108 and MB Docket 98-204, MMTC (June 2, 2017), available at <https://ecfsapi.fcc.gov/file/1060219293493/MMTC%20ExParte%20060217.pdf> (last visited April 15, 2018). We understand that the term "homogeneous" could refer to any race or either gender.

⁶ See Statement of W. Don Cornwell, Chairman and CEO, Granite Broadcasting Corporation, New York City, in Comments of EEO Supporters, MM-Docket 98-204 (Broadcast and Cable EEO Rules), filed March 5, 1999, Vol. III, Exhibit 3 (EEO Supporters 1999 Comments), available at <https://ecfsapi.fcc.gov/file/6513295240.pdf> (last visited April 15, 2018).

have called into question the constitutionality of some uses of the data collected from Form 395,⁷ the mere collection and publication of this data is permissible.⁸ An agency is allowed to collect data so long as the collection is for a legitimate purpose that does not lead to disparate treatment.⁹ Certainly, the use of this data to combat discrimination in employee recruitment is not unlawful¹⁰ and the agency faces no legal impediment for such use.

Given existing precedent that allows the FCC to use certain racial and gender data to ensure that its EEO enforcement program is empowered to prevent and prosecute discrimination, the Commission should *first* identify the stations that recruit primarily by WOM, as opposed to recruiting online or through local community job boards, employment agencies or community groups.¹¹ The Commission should then ask these primarily WOM recruiting stations to submit,

⁷ See *Lutheran Church/Mo. Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), petition for rehearing denied, *Lutheran Church/Mo. Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998), petition for rehearing *en banc* denied, *Lutheran Church/Mo. Synod v. FCC*, 154 F.3d 494 (D.C. Cir. 1998) (“*Lutheran Church*”) and *MD/DC/DE Broad. Ass’n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), petition for rehearing and rehearing *en banc* denied, *MD/DC/DE Broad. Ass’n v. FCC*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied sub nom. MMTc v. FCC*, 534 U.S. 1113 (2002) (“*MD/DC/DE Broadcasters*”) (invalidating the former recruitment and outreach portions of the EEO rules on equal protection grounds).

⁸ See *Lutheran Church*, 141 F.3d at 356; see also *MD/DC/DE Broadcasters*, 236 F.3d at 18 (holding that strict scrutiny applies only if the government’s actions lead to people being treated unequally on the basis of their race).

⁹ In Justice Kennedy’s controlling opinion, he encouraged the collection of data by race as a constitutionally permissible means to achieve a diverse student body. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 768 (2007) (Kennedy, J., concurring) (“Schools may pursue the goal of bringing students of diverse backgrounds and races through other means, including . . . tracking enrollments, performance, and other statistics by race.”)

¹⁰ See, e.g., *Caulfield v. Bd. of Educ. City of New York*, 583 F.2d 605, 611 (2d Cir. 1978) (collection of racial and ethnic data of school employees was determined to relate to the government’s statutory authority and duty to alleviate discrimination).

¹¹ See generally 2002 EEO Order. Those *not* recruiting primarily by WOM could show, for example, that they recruit primarily online and through other readily available methods such as providing notices to community groups that request them.

in camera,¹² a Form 395. If the station's staff that conducted the primarily WOM recruitment is homogeneous, the station has met both prongs of inherent discrimination and may receive sanctions under the *Jacor* and *Walton* precedents. This two-step method - *first* identifying those stations that recruit primarily by WOM, and then having those stations submit a Form 395 *in camera* - will allow the Commission to find and bring to justice those broadcasters that inherently discriminate, thereby fulfilling the purpose of the EEO rule.

Constitutionally Permissible Steps to Identify Discrimination in Recruitment

To become fully aware of which broadcasters are engaging in intentional discrimination, the Commission must make itself aware of: (1) which stations recruit primarily by WOM from their workplaces; and (2) which of those stations' workplaces are virtually homogeneous. Importantly, to evaluate this information, the Commission should consider recruitment methodology *first*. Then the Commission would consider Form 395 data for the sole purpose of evaluating whether the primary use of WOM recruitment comes from the "mouths" of a homogeneous station staff that performs the WOM recruitment. By taking these steps *in this order*, the Commission would not be engaging in the practice that troubled the Court in *MD/DC/DE Broadcasters*, which was critical of the use of Form 395 data as the *start* of the compliance analysis.¹³ And to further ensure that its course of action is constitutionally compliant, the Commission's (*in camera*) inspection of racial data would only occur once it knows that a station is engaging in the potentially unlawful practice of recruiting primarily by WOM. The only use of the Form 395 data would be to prevent and proscribe discrimination –

¹² The EEO Supporters are not seeking public availability of the reports.

¹³ See *MD/DC/DE Broadcasters*, 236 F.3d at 19 (criticizing FCC's order of review of renewal applications under which the agency looked first at the racial composition of the applicant pool and promised to "investigate any licensee that reports 'few or no' applications from women or minorities.") We are proposing that the FCC proceed in exactly the opposite order.

which, we believe, is or easily ought to be regarded as a “compelling governmental interest” as that term is defined by *Adarand*.¹⁴ Further, we trust that the Commission would use the data only for the narrowly tailored purpose of evaluating which stations’ staff compositions were so extremely homogeneous that their recruitment efforts by WOM must inevitably be regarded as discriminatory.

Three Additional Steps Needed To Implement EEO Enforcement Reforms

To implement this new enforcement plan, we recommend the Commission take three additional steps to modernize its EEO enforcement program:

1. *Audit reform.* The Commission should evaluate its audit program to ensure that auditors have sufficient information to verify that hiring decisions were made *after* the job postings were made, and not before-hand, and that audits are allowed to uncover discrimination at the points of recruitment, interviewing, and selection.

2. *Publication of Summary EEO Data.* To ensure that the Commission’s EEO enforcement efforts are bearing fruit, and to be aware of industry trends in broadcast employment that would help the Commission frame and fine-tune its EEO enforcement program, the Commission should collect and publish an annual anonymized summary of aggregate Form 395 data. Currently, this data is not available from any other source, and it is essential to evaluation of equal opportunity in broadcast employment.

3. *Locate the EEO Staff in the Enforcement Bureau.* As it pledged to consider on remand from *Prometheus III*, the Commission should determine whether EEO enforcement would more effectively and efficiently be performed by the Enforcement Bureau,¹⁵ where it

¹⁴ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235-39 (1995).

¹⁵ See *2014 Quadrennial Review*, MB Docket No. 14-50, Second Report and Order, 31 FCC Rcd 9864, 10008 ¶333 (2016) (on remand from *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (“*Prometheus III*”), acknowledging that “enforcement of the Media Bureau Equal Employment Opportunity rules, which is presently handled by the Media Bureau, might be more

could anchor a new Civil Rights Section that also includes procurement, transactions, and advertising nondiscrimination enforcement. The Commission should also assess whether the staff assigned to EEO enforcement (presently consisting of seven people, which is half the staff size of 25 years ago) is sufficient, and whether the EEO enforcement paradigms currently in use at the FCC are as rigorous as those in use in other federal EEO programs.

The FCC Should Celebrate the 50th Anniversary of the EEO Rule

On July 3, 1968, the FCC became the first federal agency to require its licensees to practice nondiscrimination in employment.¹⁶ The FCC’s dramatic and laudable action marked a watershed departure from a series of cases in which the FCC found that southern broadcast licensees banned African Americans from the local feeds of national newscasts,¹⁷ refused to allow African American clergy to offer the sign-on invocation and sign-off benediction,¹⁸ and used their airwaves to incite riots directed against voting rights workers and students trying to integrate schools.¹⁹

To recognize this history, we recommend that on **July 3, 2018** – the 50th anniversary of the broadcast nondiscrimination rule – the Commission issue a Report and Order that proscribes the continued predominant use of the inherently discriminatory use of word-of-mouth recruitment from a homogeneous workplace.

appropriate as a function of the Enforcement Bureau, given the Enforcement Bureau’s existing mission and expertise in the enforcement of the Commission’s regulations” and directing several bureaus and offices “to discuss the feasibility, implications, and logistics of shifting the enforcement of the Media Bureau Equal Employment Opportunity rules from the Media Bureau to the Enforcement Bureau.”)

¹⁶ *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices*, Docket 18244, MO&O and NPRM, 13 FCC2d 766 (rel. July 3, 1968).

¹⁷ *Lamar Life Broadcasting Co.*, 38 FCC 1143 (1965), reversed and remanded, *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

¹⁸ *Capitol Broadcasting Co.*, 38 FCC 1135 (1965).

¹⁹ *Id.*; see also *Columbus Broadcasting Co.*, 40 FCC 641 (1965).

Respectfully submitted,

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ANNEX

EEO Supporters

Asian American Journalists Association
Blacks in Government
Common Cause
Dialogue on Diversity
Hispanic Technology and Telecommunications Partnership
International Black Broadcasters Association
League of United Latin American Citizens
MANA, A National Latina Organization
Multicultural Media, Telecom and Internet Council
National Action Network
National Asian American Coalition
National Association for the Advancement of Colored People
National Association of Black Journalists
National Association of Black Owned Broadcasters
National Association of Multicultural Digital Entrepreneurs
National Coalition on Black Civic Participation
National Council of Negro Women
National Diversity Coalition
National Hispanic Foundation for the Arts
National Indian Telecommunications Institute
National Newspaper Publishers Association
National Organization of Black County Officials
National Organization of Black Elected Legislative Women
National Puerto Rican Chamber of Commerce
National Urban League
National Utilities Diversity Council
Native American Journalists Association
Public Knowledge
Rainbow PUSH Coalition
Transformative Justice Coalition
U.S. Black Chambers of Commerce
Vision Maker Media
Women in Cable Telecommunications